In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-557

JESSE SMITH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury-waived trial in the United States District Court for the Eastern District of New York, petitioner and one Rocco Lauria were convicted of having conspired to use extortionate means to collect an extension of credit, in violation of 18 U.S.C. 894. Petitioner was sentenced to three years' imprisonment. The court of appeals affirmed in a lengthy opinion on July 13, 1972 (Pet. App. A). The petition for a writ of certio-

rari was not filed until October 6, 1972, and is therefore almost two months out of time under Rule 22(2) of the Rules of this Court. There is, in any event, no reason to grant the writ.

Petitioner contends that his conviction violated the *ex post facto* clause of the Constitution because, he alleges, the conspiracy commenced before the effective date of the statute and did not continue thereafter.[1] This claim is fully analyzed and properly rejected in the opinion below, on which we rely. Petitioner also asserts, citing *Grosso* v. *United States,* 390 U.S. 62, *Haynes* v. *United States,* 390 U.S. 85, and *Marchetti* v. *United States,* 390 U.S. 39, that requiring him affirmatively to show his withdrawal from the conspiracy would violate his rights against self-incrimination. Petitioner did not raise this claim in the court of appeals and he should not be permitted to raise it for the first time in this Court. *Lawn* v. *United States,* 335 U.S. 339, 362, n. 16; *Adickes* v. *Kress & Co.,* 398 U.S. 144, 147, n. 2. Moreover, he does not even discuss it in the petition, except for raising it as a "question presented." In any event, there is no merit to the contention. Had he wished to withdraw, petitioner had no affirmative duty to disclose any information to the authorities; he could have withdrawn simply by telling the victim of the extortion that he would no longer have to pay. To the extent he may be focusing on the practical need to testify at trial in order to present a basis

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[1] Co-defendant Lauria has filed a separate petition for a writ of certiorari raising the same issue (No. 72-409).

for an affirmative defense, there is clearly no compelled incrimination in the constitutional sense.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1972.

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